TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 167.

WILLIAM A. PLATT, AS RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER, COLORADO, PLAINTIFF IN ERROR,

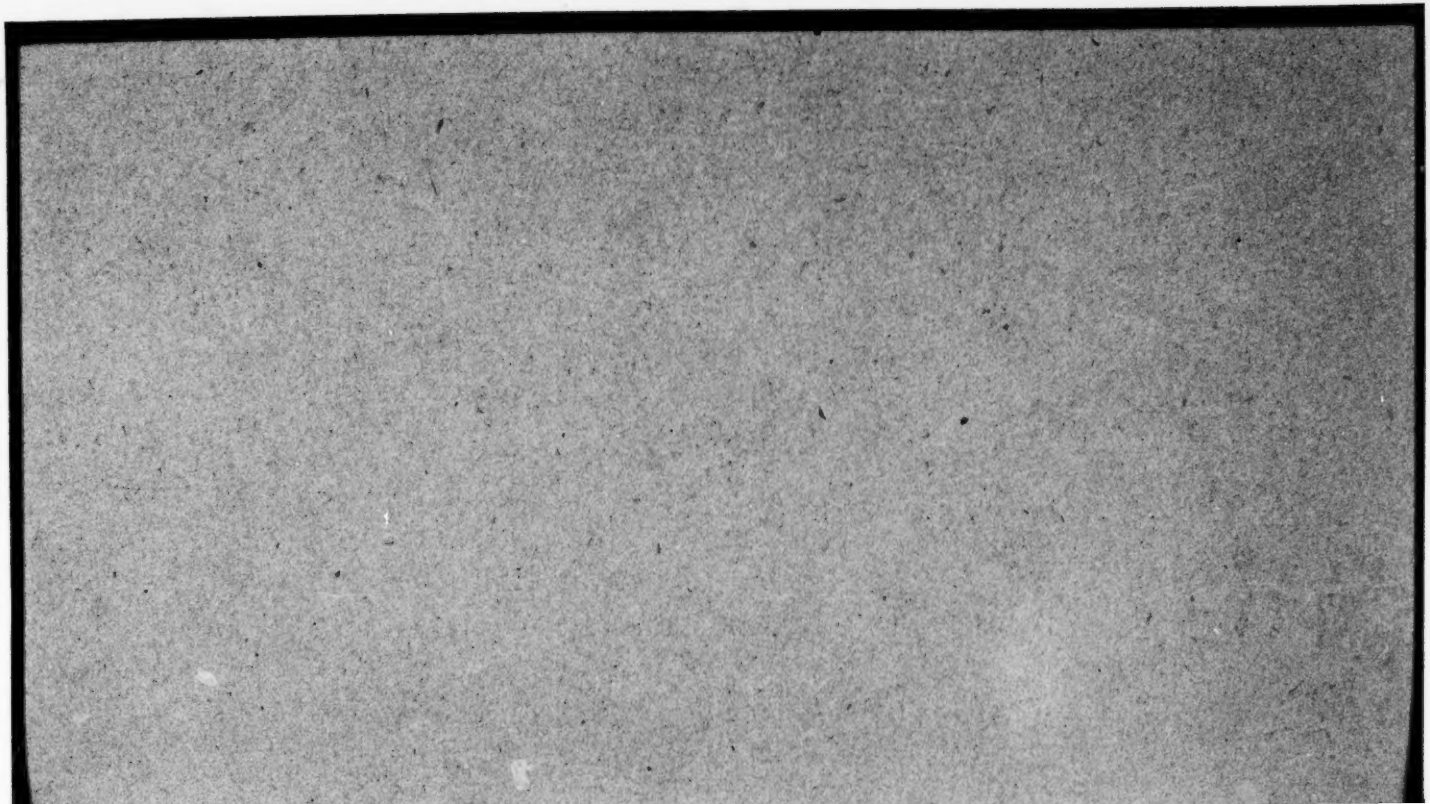
vs.

OSEE W. WILMOT.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED DECEMBER 13, 1902.

(18,747.)



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a United States Circuit Court of Appeals for the Second Circuit.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff in Error (Plaintiff Below),
vs.
OSEE W. WILMOT, Defendant in Error (Defendant Below).

Transcript of Record.

Error to the circuit court of the United States for the northern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Oct. 8, 1902. William Parkin, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between William A. Platt, as receiver of the Commercial National Bank of Denver, Colorado, and Osee W. Wilmot, a manifest error hath happened, to the great damage of the said William A. Platt, as receiver of the Commercial National Bank of Denver, Colorado, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the second circuit, together with this writ, so that you may have the same at the city of New York on the 24th day of September, 1902, in the said United States circuit court of appeals, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

2 Witness the Honorable Melville W. Fuller, Chief Justice of the United States at the city of Utica, in the northern district of New York, this 27th day of August, A. D. 1902.

[SEAL.] W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York,
By C. W. HIGGINSON, *Deputy.*

Allowed by
ALFRED C. COXE, *U. S. J.*

(Endorsed:) At law 3311.—U. S. circuit court.—N. D. of N. Y.—Wm. A. Platt, rec'r, &c., *v.* Osee W. Wilmot.—Writ of error.—U. S. circuit court, N. D. of N. Y.—Filed Aug. 27, 1902.—W. S. Doolittle, clerk.

3 *Præcipe for Summons.*

Circuit Court of the United States for the Northern District of New York.

W. A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff,
vs.
OSEE W. WILMOT, Defendant.

Hon. W. S. Doolittle, clerk circuit court U. S., northern district of N. Y.:

You will please issue a summons to the defendant, Osee W. Wilmot, in the above-entitled action.

POWELL & CADY,
Attorneys for Plaintiff.

Office and post office address, No. 206 Broadway, New York city, N. Y.

(Endorsed:) Præcipe for summons.—Filed Sep. 17, 1898.—W. S. Doolittle, clerk.

4 *Complaint.*

Circuit Court of the United States for the Northern District of New York.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff,
vs.
OSEE W. WILMOT, Defendant.
} Complaint.

The plaintiff complains, and for cause of action alleges, upon information and belief:

I. That during all the times complained of herein, the Commercial National Bank of Denver, Colorado, was a corporation organized and existing under the laws of the United States as a national bank, with its residence and *situs* at the city of Denver, and a citizen of the State of Colorado.

That on October 24, 1893, one Frank Adams was, by the action and order of the Comptroller of the Currency of the United States, appointed receiver of said Commercial National Bank of Denver,

Colorado, under and by virtue of the national banking laws of the United States.

That afterwards and on March 15, 1898, said Frank Adams resigned his office and position as such receiver, and thereupon his resignation was accepted, and the Comptroller of the Currency of the United States, under and by virtue of the powers vested in
5 him by the national banking laws of the United States, appointed William A. Platt, this plaintiff, as receiver of the said Commercial national bank, with power and authority to collect all assets of said bank and close up all of its affairs.

That thereupon said William A. Platt, this plaintiff, qualified as such receiver, and is now the acting receiver of the said Commercial National Bank of Denver, Colorado, under and by virtue of his said appointment by the Comptroller of the Currency. That this plaintiff has been authorized and directed to prosecute this action for collection of the judgment, claim and demand of the said Commercial National Bank against The Western Farm Mortgage Trust Company of Lawrence, Kansas, as such receiver, and for the purpose of winding up the affairs of said bank.

II. That the defendant Osee W. Wilmot is a resident and citizen of the district of this court and the State of New York.

III. That the Western Farm Mortgage Trust Company of Lawrence, Kansas, was at all the times hereinafter mentioned, a corporation organized as a business corporation, and existing under and by virtue of the laws of the State of Kansas, with a capital stock of $1,500,000, and had its residence and principal place of business at the city of Lawrence, in the county of Douglas, State of Kansas, and it was not a railroad, religious or charitable organization.

IV. That heretofore and on the 3d day of June, 1893, the said Commercial National Bank, in an action then pending in the district court of Douglas county, in the State of Kansas, wherein said Commercial National Bank of Denver, Colorado, was plaintiff and The Western Farm Mortgage Trust Company of Lawrence, Kansas, was defendant, by the consideration of said court recovered a judgment against said Western Farm Mortgage Trust Company, of
6 Lawrence, Kansas, for the sum of $4,930.72 (in an action for debt) with interest on said judgment from the date thereof at the rate of ten per centum per annum.

V. That the said Western Farm Mortgage Trust Company of Lawrence, Kansas, was duly and personally served with summons in said action, in the manner prescribed by the laws of the State of Kansas, and said Western Farm Mortgage Trust Company of Lawrence, Kansas, duly entered its appearance in said action, and that said district court had full jurisdiction of the person of the said Western Farm Mortgage Trust Company of Lawrence, Kansas, in said action and of the subject matter of the action.

VI. That said judgment has not been appealed from, has not been paid, and still remains in full force and effect and there is now due the plaintiff upon said judgment the sum of $4,930.72 with interest

thereon from said June 3, 1893, at the rate of ten per centum per annum.

VII. That afterwards and on August 29, 1894, the said Frank Adams as receiver, caused to be issued and there was issued by the clerk of the district court of Douglas county, Kansas, an execution on the aforesaid judgment directed to the sheriff of said Douglas county, State of Kansas (the same being the county of the residence of the said Western Farm Mortgage Trust Company of Lawrence, Kansas), directing him (the said sheriff) to levy upon and sell the goods, chattels, personal and real property, lands and tenements of the said Western Farm Mortgage Trust Company of Lawrence, Kansas, for the payment of said judgment and costs; that The Commercial National Bank of Denver, Colorado, was the plaintiff in said execution, and the said Western Farm Mortgage Trust Company was the defendant in said execution. That said execution
7 was thereupon and on the 29th day of August, 1894, delivered to the sheriff of said Douglas county, in the State of Kansas, for execution and return, as therein commanded, and that afterwards, to wit, on the 7th day of September, 1894, said sheriff returned said execution to the clerk of the district court of Douglas county, in the State of Kansas, *nulla bona* and wholly unsatisfied, there being no property found whereon to levy said execution.

VIII. That at the time of the *insurance* of said execution the said Western Farm Mortgage Trust Company of Lawrence, Kansas, was wholly insolvent and had no property or assets whatever subject to execution, nor has it at any time since the issuance of said execution, had any property or assets whatever subject to execution out of which the amount of said judgment or any part thereof could be paid or collected.

IX. That at the time of the pendency of said action and the rendition of the judgment thereon, and the return of the execution thereon, the defendant, Osee W. Wilmot, was and still is a stockholder and shareholder and owner and holder of twenty (20) shares of the capital stock of the Western Farm Mortgage Trust Company of Lawrence, Kansas, of the par value of one hundred dollars each, total par value two thousand dollars, and that by reason of the facts hereinbefore stated, and the provisions of the constitution and the laws of the State of Kansas and of the United States, said Osee W. Wilmot became and is liable to this plaintiff in an amount equal to the capital stock of the said Western Farm Mortgage Trust Company of Lawrence, Kansas, owned by the said Osee W. Wilmot, to wit, the sum of two thousand dollars with interest thereon from the 17th day of September, 1898.

Wherefore the plaintiff demands judgment against the de-
8 fendant for the sum of two thousand dollars ($2,000) with interest thereon from the 17th day of September, 1898, together with the costs of this action.

POWELL & CADY,
Attorneys for Plaintiff.

Office and post office address, 206 Broadway, New York city.

STATE OF NEW YORK, }
County of New York, } ss:

Omar Powell, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the sources of affiant's information and belief as to those matters therein stated to be alleged upon information and belief are statements of plaintiff's agent made to affiant, and letters, memoranda and data received from him, and the certificate of the clerk of the district court of Douglas county, Kansas, and certified copy of the charter of the Western Farm Mortgage Trust Company of Lawrence, Kansas, all of which papers are now in affiant's possession.

That the reason this verification is made by Omar Powell, plaintiff's attorney, is that the plaintiff is a foreign corporation and is not, neither are any of its officers, within the county where plaintiff's attorneys reside and have their office.

OMAR POWELL.

Sworn to before me this 13th day of October, 1898.

G. H. FALKENBURG,
Notary Public, Kings County.

Cert. filed in New York Co.

(Endorsed:) Complaint.—Filed Apr. 1, 1902.—W. S. Doolittle, clerk.

9 *Summons.*

United States Circuit Court for the Northern District of New York.

W. A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff,
against
OSEE W. WILMOT, Defendant. } No. 3311.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, at the city of Utica, in said northern dis-

trict of New York, this seventeenth day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

[L. S.] W. S. DOOLITTLE, *Clerk.*

POWELL & CADY,
Plaintiff's Attorneys.

Office and post office address, 206 Broadway, New York city, New York.

10 UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

I hereby certify that on the 1st day of October 1898, at Watertown, I personally served the within summons on the within named defendant, Osee W. Wilmot, by showing the same and delivering to and leaving with him true copy thereof.

W. R. COMPTON,
U. S. Marshal,
By W. S. COLE, *Deputy.*

Service	2 00
Travel	4 20
	6 20

(Endorsed:) Summons.—Filed Oct. 7, 1898.—W. S. Doolittle, clerk.

Notice of Retainer.

United States Circuit Court for the Northern District of New York.

W. A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado,
vs.
OSEE W. WILMOT. } No. 3311.

GENTLEMEN: Please take notice that we have been retained and hereby appear for the defendant in the above entitled action;
11 and demand a copy of the plaintiff's complaint, which may be served upon us at our office, No. 16 Washington street, Watertown, N. Y.

Dated October 8, 1898.

Yours, &c., ROGERS & ATWELL,
Defendant's Attorneys.

Office and P. O. address, 16 Washington street, Watertown, N. Y.

To Messrs. Powell & Cady, plaintiff's attorneys, and clerk, U. S. circuit court.

(Endorsed:) Notice of retainer.—Filed Oct. 10, 1898.—W. S. Doolittle, clerk.

Answer.

Circuit Court of the United States for the Northern District of New York.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado,
against
OSEE W. WILMOT.
No. 3311.

I.

The defendant answering the complaint admits that he is a resident and citizen of the district of this court, and the State of New York.

12 That on and prior to the month of October, 1891, there was a corporation by the name of the "Western Farm Mortgage Trust Company of Lawrence, Kansas," organized as a business corporation and existing under and by virtue of the laws of the State of Kansas, with a capital stock of $1,500,000; and had its residence and principal place of business at the city of Lawrence, county of Douglas, State of Kansas, and was not a railroad, religious or charitable organization.

That on and prior to the last mentioned date, the defendant was a stockholder and shareholder and owner and holder of twenty shares of the capital stock of the said Western Farm Mortgage Trust Company, of Lawrence, Kansas, of the par value of $100 each and of the total par value of $2,000; but he denies that he now is, or at any time since the commencement of this action was, or at any time since said October, 1891, has been, a stockholder or shareholder, or owner or holder, of twenty shares, or any shares, of the capital stock of the said Western Farm Mortgage Company of Lawrence, Kansas.

And the defendant denies any knowledge or information sufficient to form a belief as to each and every other allegation in said complaint contained.

II.

And the said defendant for a second and further answer and defense herein, on information and belief alleges:

That the pretended cause of action set out in the complaint did not accrue to the said Commercial National Bank of Denver, Colorado, nor to Frank Adams, as receiver of the Commercial National Bank of Denver, Colorado, nor to the plaintiff as the successor in office of said Frank Adams, as receiver of the Commercial National Bank of Denver, Colorado, at any time within the six years next preceding the commencement of this action.

13 III.

That said defendant for a third and further answer and defense herein, on information and belief alleges:

That the pretended cause of action set forth in the complaint is one to force a liability created by the constitution or statute law of the State of Kansas; that said Western Farm Mortgage Trust Company of Lawrence, Kansas, was, at the time of its organization and at the time of the issuing of the stock therein mentioned, a moneyed corporation, and that the pretended cause of action set forth in the complaint is one to enforce a liability created by the constitution and statute law of the State of Kansas; and that the alleged right of action for the liability claimed to have been so created under said constitution and statute, or either, did not accrue to the plaintiff, to Frank Adams, his predecessor in office, nor to the Commercial National Bank of Denver, Colorado, at any time within the three years next preceding the commencement of this action.

IV.

Said defendant for a fourth and further answer and defense herein, on information and belief alleges:

That the said Commercial National Bank of Denver, Colorado, did not bring an action for the collection of its alleged debt against the said Western Farm Mortgage Trust Company of Lawrence, Kansas, within two years after the debt became due, and that the defendant ceased to be a stockholder in the said Western Farm Mortgage Trust Company of Lawrence, Kansas, more than two years prior to the commencement of this action.

V.

The said defendant for a fifth and further answer and defense herein, on information and belief, alleges:

14 That at the time of the commencement of this action A. G. Brower, of Utica, N. Y.; M. P. Mason, of Carthage, N. Y.; Martin V. B. Bull, of Albany, N. Y., and divers others persons to this defendant unknown (but all well known to plaintiff), all being residents and citizens of the northern district of the State of New York, were, and still are owners and holders of divers shares of the capital stock of the said Western Farm Mortgage Company of Lawrence, Kansas; and that an ascertainment and adjustment of the rights and liabilities of this defendant to and with said plaintiff and the creditor whom he claims to represent, cannot be had without the presence of said stockholders as parties to this action; and that the said persons so named and the said unknown stockholders are and each of them is a necessary party defendant herein.

Wherefore, defendant demands judgment dismissing plaintiff's complaint, with costs.

ROGERS & ATWELL,
Defendant's Attorneys.

Office and P. O. address, 16 Washington street, Watertown, N. Y.